

No. 21-1333

IN THE
Supreme Court of the United States

REYNALDO GONZALEZ, ET AL.,
Petitioners,
v.
GOOGLE LLC,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**BRIEF OF MICROSOFT CORP. AS AMICUS
CURIAE IN SUPPORT OF RESPONDENT**

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INTEREST OF AMICUS CURIAE¹

Microsoft Corporation is a leading innovator in computer software and interactive computer services. Microsoft's mission is to empower every person and every organization on the planet to achieve more. It does that by creating technology that transforms the ways people work, play, and communicate. Today, these advances largely operate online. Given the vast quantity of information on the internet, as Microsoft's technology connects people and ideas online, it relies on recommendation algorithms—that is, digital tools that recognize patterns, filter information based on those patterns, and then present to users the information that is likely to be most pertinent to them.

This brief highlights four Microsoft digital services that vividly illustrate the critical role that recommendation algorithms play in daily life—from how we gather news to how we search the internet for content—and the devastating and destabilizing effects that adopting Petitioners' proposed rule would have.

- ***Bing*** is one of the world's leading online search engines. Its primary objective is to connect users with the most relevant search results from around the web. Bing depends on sophisticated algorithms to survey, organize, and display those results in the blink of an eye.

¹ No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amicus and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

- ***LinkedIn*** hosts a widely used online social network with a professional focus that includes 875 million members worldwide, including over 194 million members in the United States. LinkedIn uses algorithms to connect professionals with contacts, content, and job opportunities.
- ***Microsoft Start*** is a personalized feed of online news, entertainment, and lifestyle content. It aggregates content created by premium national publishers, local newsrooms, and others and then, relying on algorithms, curates that content to match users' interests.
- ***GitHub*** is the largest platform in the world for hosting and developing software code. Its wide range of tools—many of which use algorithms—allows developers to collaborate to make software better.

The diverse nature of these services affords Microsoft a unique view into the legal, technical, and economic stakes of massively expanding liability in the way that Petitioners propose.

INTRODUCTION AND SUMMARY OF ARGUMENT

When Congress enacted Section 230 of Title 47 in 1996, it recognized that internet services and sites “represent an extraordinary advance in the availability of educational and informational resources to our citizens.” 47 U.S.C. § 230(a)(1). These critical resources provide “diversity of political discourse,

unique opportunities for cultural development, and myriad avenues for intellectual activity” and “entertainment.” *Id.* § 230(a)(3), (5). That is even more true now than it was then. There are now *trillions* of web pages on the internet.

In other words, the internet is host to far more content than any human could review, sift, or benefit from without the aid of sorting mechanisms. To ensure users aren’t awash in a sea of undifferentiated information, the modern internet runs on algorithmic recommendations. A recommendation algorithm is simply a set of digital instructions to recognize certain patterns about users and, based on those instructions, filter information most pertinent to users. Numerous services build these decision-making tools into their operations to determine the content that they will feature online and in what order.

For instance, if you type a query into Microsoft’s search engine Bing, the results that it selects are based on algorithmic recommendations. And the way it does so is fundamentally the same way that Microsoft’s professional networking site LinkedIn uses algorithms to suggest jobs or contacts to users. And that is, at heart, no different from how another Microsoft service, Microsoft Start, aggregates news and other content that it then presents to its users. All of these services use sophisticated algorithms to determine what content to display to users, based on information about those users.

Petitioners’ rule would strip these digital publishing decisions of long-standing, critical protection from

suit—and it would do so in illogical ways that are inconsistent with how algorithms actually work. Their rule would thereby expose interactive computer services to liability for publishing content to users whenever a plaintiff could craft a theory that sharing the content is somehow harmful. Simply put, the stakes could not be higher. To make those stakes as concrete as possible, this brief highlights just a few of the many services that use algorithmic recommendations to provide critical services that have become an essential part, not just of using the internet, but of daily life. In doing so, it shows the variety and value of algorithmic recommendations. And it shows the very significant flaws in Petitioners’ and the Government’s attempts to circumscribe Section 230. Accepting their arguments would wreak havoc on the internet as we know it.

The alternative, of course, is not “anything goes.” The breadth and depth of Microsoft’s experience has long led it to advocate a balanced approach to content regulation, both in the United States and abroad. Microsoft has been a vocal proponent of the need for tech companies to incorporate digital safety into everything they do—from how they build their platforms to the moderation of harmful content. And Microsoft has specifically advocated in favor of legislative reform of Section 230. But, precisely because the modern internet has grown up around—and in reliance on—long-standing interpretations of Section 230, that state of affairs should be disrupted only by a carefully calibrated legislative solution. Petitioners have proposed nothing of the kind. Their sweeping and unstable rule fails to grapple with the technologies that their rule would affect and the statute that Congress actually

enacted. Microsoft therefore urges the Court to affirm the decision below.

ARGUMENT

I. Petitioners’ Incoherent Line-Drawing Jeopardizes Online Services Of All Types.

Vital online services ranging from search engines to news sites to networking and social coding platforms use algorithms driven by user input to arrange and present—i.e., to publish—the content created by others. Petitioners fail to offer any principled or sensible way to differentiate uses that are protected by Section 230 from those that are not, and the rule they advocate would create massive legal vulnerability for every platform—from the largest to the smallest—that uses this critical technology. The inevitable result is that platforms will have to cut back on the third-party content they display, thereby diminishing the very diversity and openness that Congress intended Section 230 to foster.

A. Search engines are protected by Section 230, as Petitioners must concede.

Petitioners struggle to offer the Court any clear test for immunity under Section 230(c)(1). This is evident from their wildly open-ended Question Presented: “Under what circumstances does the defense created by section 230(c)(1) apply to recommendations of third-party content?” Pet. Br. i. More than just open-ended, this departs radically from the Question Presented set forth in the Petition, in ways that are telling:

Does section 230(c)(1) immunize interactive computer services when they make *targeted recommendations of information* provided by another information content provider, or only limit the liability of interactive computer services when they *engage in traditional editorial functions* (such as deciding whether to display or withdraw) with regard to such information?

Pet. i (emphases added). In short, the Petition proposed to draw a line between “targeted recommendations” (which, Petitioners say, are not immunized) and “traditional editorial functions” (which are). Now, Petitioners have retreated from their position on “targeted recommendations,” acknowledging that *some* recommendations are protected and asking the Court to assess which ones are not.

Why the turnabout? Petitioners themselves make the answer clear: Because it would be unthinkable to deprive search engines of the protection of Section 230(c)(1), and search engines are quintessential sources of recommendations on the internet. So while Petitioners offer the Court little concrete guidance about the meaning of Section 230(c)(1), they do offer one clear line: Search engines are immune. Pet. Br. 15-16. Petitioners are right to make that concession, for a contrary rule would be disastrous, rendering virtually useless the primary tool by which billions of people navigate the otherwise unmanageable amount of information on the internet.

To avoid that unpalatable result, Petitioners try to distinguish search engines from the numerous

other services that use algorithmic recommendations. They insist that, unlike other services, search engines merely “provide users with materials in response to requests from the users themselves.” Pet. Br. 15; *see id.* at 44. On that point, Petitioners are simply wrong. A search engine is not an animatronic librarian, robotically fetching the book that a user requests. Rather, search engines are sophisticated services that go beyond a simple textual query in order to understand the user’s likely intent, and then sort, select, and recommend information that best captures what the user is after. In other words, a search engine does just the thing that, according to Petitioners, forecloses immunity: It provides content “based upon *what [it] thinks* the user would be interested in.” Pet. Br. 44 (quotation marks omitted).²

Given Petitioners’ characterizations of search engines, it is important to understand how a search engine actually works. The reality looks nothing like

² Petitioners also seek to distinguish search engines from other services on the theory that search engines provide users with “URLs [that] are created by the website where the material at issue is located, not by the search engine itself.” Pet. Br. 15. A Uniform Resource Locator (or URL) is merely the address for a web page; for instance, “www.supremecourt.gov” directs a user to the website for the Court. Petitioners’ theory seems to be that search engines do not create such addresses, and other services do. That is a distinction without a difference. Providing a hyperlink to a URL does not entail “creat[ing] or develop[ing]” content, such that Section 230 immunity would not apply. As the Government recognizes, “the creation of navigational hyperlinks is inherent in the provision of an online platform.” U.S. Br. 33. The use of URLs is no basis to differentiate search engines from any other platform that uses recommendation algorithms.

Petitioners' caricature. Consider Microsoft's search engine, Bing.

* * *

Bing

Suppose a user wants to know, “What do I do for a headache?” The user enters that query into Bing, and Bing's search engine sifts through the array of content on the internet and publishes as top results the most reasonable, professional sources that are responsive to the query—for instance, websites on that topic from the Mayo Clinic and Harvard Medical School. It's no accident that Bing returns those results, and not, say, the recommendations of the ancient Greek physician Aretaeus of Cappadocia,³ or the home remedies detailed by a blogger in their online journal. All of that—and vast quantities of more or less desirable information—exists on the internet and could be returned by a search. Yet Bing pushes to the bottom of the search results the sites that are less likely to be relevant or credible—for instance, ones that discuss medieval remedies and snake oil. (Although if that is what the user is looking for, they can find it with a more targeted query.)

³ He advised headache sufferers to “shave off the hair and ... cauterize superficially down to the muscles.” Alexis C. Madrigal, *Got a Headache? Try Some (Bizarre) Treatments from History*, *The Atlantic* (July 21, 2010), <https://www.theatlantic.com/technology/archive/2010/07/got-a-headache-try-some-bizarre-treatments-from-history/60167/>.

To deliver meaningful search results in a blink of an eye, Bing relies on a host of sophisticated algorithms. Bing starts by building, and then continually updating, an index of sites on the web. It uses software to canvass (or “crawl”) the internet, extracting links and other information from individual pages. It organizes that information into an index of billions of web pages—essentially, an outline of the worldwide web. Bing’s extensive index powers not only its own search, but also that of other major engines such as Yahoo!.⁴

Then, when a user inputs a query, Bing’s ranking algorithms get to work. Microsoft’s engineers design those algorithms to rank results from most to least useful—that is, to make choices about which websites to feature for users—based on several core principles. First and foremost is relevance, or how closely the content on the linked page matches the likely intent behind the user’s search query. The algorithms are trained to look beyond the literal “textual questions” the user types, *Pet. Br. 44*, to consider contextually related topics, synonyms, and abbreviations. Bing also ranks results based on the quality and credibility of websites; for instance, a page that provides supporting citations for its claims will rank higher than a page with a cursory account, or one full of offensive statements. Past user engagement (for instance,







⁴ For more, see Bing, *Webmaster Tools help & how-to*, <https://www.bing.com/webmasters/help/webmasters-guidelines-30fba23a> (last visited Jan. 18, 2023); and Microsoft, *How Bing delivers search results*, <https://support.microsoft.com/en-us/topic/how-bing-delivers-search-results-d18fc815-ac37-4723-bc67-9229ce3eb6a3> (last visited Jan. 18, 2023).

whether users tend to click on the link to see the website, and how long they spend looking at it) also informs a page's ranking, as do factors including freshness (how recently content was generated when it claims to be timely) and page load time (how quickly a user will be able to access information at that location).

Petitioners are wrong to characterize search engines as merely responding in rote fashion to "the user's ... textual questions." Pet. Br. 44. In fact, search engines engage in a highly sensitive interpretation of users' queries, relying on part on information about the user to tailor their responses to the user herself. Indeed, doing so is at the heart of what makes such a service useful. For instance, Bing's algorithms take into account the user's location to help provide more responsive content for searches like "weather" or "restaurants open now." Bing also draws on the user's primary language, so that a high schooler in Peoria, Illinois, working on a project about the French Revolution will receive results in English rather than in French. Bing also looks to a user's previous search history to ascertain which meaning of a particular word the user likely intends. For instance, in response to the query "How fast does a jaguar go?" Bing may prioritize results from *zoologist.com* for a user with a history of searching for animal facts, but results from *Car and Driver* for a user with a history of automotive searches. Thus Bing, like other search engines, draws on information beyond users' narrow textual queries in order to deliver responsive results.

Bing relies in several other ways on its algorithms to provide content that is responsive to users' interests. Before it even offers search results, Bing acts proactively to help users formulate their search. Algorithms trained to incorporate the user's previous queries, as well as those of other users, offer auto-complete suggestions. So when a user begins typing her query—for instance, “what to do for...”—Bing's algorithms save her time and hassle by suggesting “a headache”:

what to do for

-  [what to do for a headache](#)
-  [what to do for leg cramps](#)
-  [what to do for a sore throat](#)
-  [what to do for earache pain](#)
-  [what to do for a stye](#)
-  [what to do for low potassium](#)

Similarly, once the user has entered her search, Bing offers up additional suggestions: a list of questions that “[p]eople also ask,” as well as a list of other “[r]elated searches”:

People also ask

ALL

Management of chronic headaches

Tension


What is the best thing to take for a headache?

What medicine can I take for a headache?

What do I need to do if I have headaches?

What is a natural remedy for headaches?

Related searches for what to do for a headache

 how to **get rid of** headaches how to **get rid of** headaches
fast how to **cure** a headache headache for **over a week**

These algorithms also help balance Congress’s goal of promoting the open internet while protecting against “objectionable or inappropriate content.” See 47 U.S.C. § 230(b)(4). For certain illegal or abusive content—such as material reflecting child sex abuse or facilitating the purchase of illegal drugs from overseas—Bing will use a different set of tools (not at issue here) to remove links to the material from its

index, and thereby from its search results. Recommendation algorithms help with other types of potentially objectionable material or queries, for instance, related to physician-assisted suicide. Rather than removing such results, Bing may instead “downrank” them; that is, make them less likely than other sources to appear in a user’s top search results. Consistent with Microsoft’s commitment to free expression and a free internet, this ensures that most users will be unlikely to stumble onto these materials, while protecting the ability of users who may want to view them for good reasons—for instance, a researcher studying physician-assisted suicide.

* * *

As Bing shows, modern search engines are far from the basic call-and-response system Petitioners make them out to be. That, therefore, cannot be the reason that search engines are protected by Section 230. The reason, instead, is that search engines use algorithms to select and arrange—that is, to “publish[]”—content “provided by another.” 47 U.S.C. § 230(c)(1); *see* Resp. Br. 23-26. “[T]he choice of presentation,” in other words, “does not itself convert the search engine” or other platform “into an information content provider” itself. *Marshall’s Locksmith Serv., Inc. v. Google, LLC*, 925 F.3d 1263, 1269 (D.C. Cir. 2019); *see* 47 U.S.C. § 230(f)(4) (defining “access software provider,” which is an “interactive service provider” immune for publishing another’s content, as a provider of tools to “filter, screen, allow, or disallow,” “pick, choose,” “display, ... organize, [or] reorganize content”); Resp. Br. 28-29. Put differently, ranking other websites in search results—which is what Bing

uses recommendation algorithms to do—in no way makes Bing “responsible, in whole or in part, for the creation or development” of those websites. § 230(f)(3). That the recommendation algorithms used by Bing (and many others) rely on user input to shape how they present content only underscores that they are not creating their own content, but merely connecting users to third-party content based in part on the users’ own signals about what content is valuable to them.

B. Other platforms use recommendation algorithms in ways that are similar to search engines and likewise are protected by Section 230.

Search engines are far from the only services that use algorithmic recommendations to determine what third-party content to publish to users. To take another prominent example, algorithms are likewise crucial for the proper and effective functioning of social networking services such as LinkedIn. Like Bing, LinkedIn relies on user input to determine whether and how it will display third-party content to users. When it does so, it “publish[es]” the content of “another,” not its own content. § 230(c)(1). Adopting Petitioners’ contrary rule would threaten disabling liability for these services; after all, like search engines, such services depend on a combination of “specific request[s] from the user” and “what [the platform thinks] the user would be interested in.” Pet. Br. 44 (emphasis omitted). Petitioners’ rule would give rise to a massive expansion of legal liability that should be left to Congress to calibrate in the first instance.

LinkedIn


LinkedIn is a global online social network for professionals. It connects more than 875 million users (or “members”) in 200 countries looking to find jobs, fill positions, connect with others, and grow professionally, through shared professional content and contacts.⁵ Each minute, 8 people are hired through the site, from the underwriter laid off during COVID-19 and hired for a new job within weeks of posting, to the food server recruited to a job as a customer service specialist because she had developed the relevant skill set.⁶

LinkedIn helps its members form, grow, and learn from their professional networks. One way it does so is by displaying for members the content and interactions of other people in their network. It also does so by sharing content that is likely to be of interest for the member but that she has not expressly chosen to include in her network. To decide which content to feature, LinkedIn relies on algorithms trained on a

⁵ For additional information about LinkedIn, see LinkedIn Pressroom, *About Us: Statistics*, <https://news.linkedin.com/about-us#Statistics> (last visited Jan. 18, 2023); Tim Jurka et al., *A Look Behind the AI that Powers LinkedIn’s Feed*, LinkedIn Engineering (Mar. 29, 2018), <https://engineering.linkedin.com/blog/2018/03/a-look-behind-the-ai-that-powers-linkedins-feed--sifting-through>.


⁶ See Tomer Cohen, *How LinkedIn is Helping Millions of People Get Back to Work*, LinkedIn Official Blog (Oct. 28, 2020), <https://blog.linkedin.com/2020/october/29/how-linkedin-is-helping-millions-of-people-get-back-to-work>.




variety of information, including the member's alma mater, what kinds of content she's engaged with in the past, and whether others in her network found the content insightful. Members enter professional data into their profiles, such as current job, education and training, skill set, and what kind of jobs they may be looking for. They also send and accept requests for connections with other members, including professional contacts (e.g., a current colleague or a former classmate). LinkedIn's algorithms gather such information—including "textual" data "*from the user*," Pet. Br. 44 (describing search engines)—to populate a member's feed (an example of which is displayed below):







Leticia Travieso · 1st
Photographer + Storyteller
23m · 🌐


Today, I'm releasing a free kit on how to get started with electronic media, for free. Please DM me if I can help in any other way.



   36 8 comments · 2 reposts






 Like  Comment  Repost  Send

Puja Chaudhary loves this ...



Estela Stewart · 1st
Business Development Representative...
2d · 🌐

The Grocery Store Shring Ray strikes again. These "family" rolls were substituted in for the "Huge" rolls I had always been purchasing in the ...see more

 Home  My Network ²  Post  Notifications ⁵  Jobs

When a member's connections post content (whether a professional update or an article), or even just "like" content, that content may appear in the member's feed on her own home page. So too does content that is related to the background information that the user provided.

In this way, LinkedIn is a kind of professional social media site. Petitioners are just wrong that "social media sites" are "different" from "[s]earch engines"—which Petitioners must concede are covered by Section 230—in the "important respect[]" in which they "respon[d] to requests from ... users." Pet. Br. 15. Every time a user logs in, LinkedIn relies on machine-learning algorithms to identify the best conversations for her to join, similar to how search engines like Bing or Google rely on algorithms to identify the most relevant search results. In mere milliseconds, LinkedIn ranks the most relevant posts at the top of her feed, with less relevant posts appearing deeper down the list, again much like search engines use algorithms to rank results. The ranking depends in part on the information that a member provides in her profile. For instance, the algorithm is designed to prioritize posts relevant to individuals working in her field, or the location where she works, or concerning skills the member has or would like to develop.

In addition, a host of other signals—many of which track the inputs used in the algorithmically driven computer services described above—help curate the feed. For instance, LinkedIn's algorithm considers the user's past behavior: what content the user has liked and shared in the past, what sources the

user has interacted with most frequently, and the topics in which the member has shown the most interest. It also assesses certain data about a particular post (again, much like a search engine): what topics it covers, when it was last updated, what language it was written in, how many people—including the user’s contacts—viewed or liked it. Similar algorithmic processes organize the ways LinkedIn connects users to people and jobs. Without the sophisticated analysis enabled by algorithms, a user would be stuck looking at a list of every last one of the 3.8 million daily posts on the entire site—which inevitably would bury the perfect job or article below reams of less relevant information.

In addition to allowing LinkedIn to connect members with useful content and professional contacts, its algorithms empower LinkedIn to take a more sensitive approach to curating content than simply permitting or excluding it. That is particularly important as digital scammers develop more sophisticated schemes that mimic legitimate opportunities. If, for instance, LinkedIn’s algorithms detect a post or job listing that may have unprofessional or illegitimate content, they can significantly limit how broadly that content is displayed while human reviewers investigate and assess whether the material in fact falls afoul of the law or LinkedIn’s professional community policies. If it doesn’t, LinkedIn has protected a legitimate post from being removed and can restore its place as appropriate. (If it does, LinkedIn will remove it, a decision that is separately protected by 47 U.S.C. § 230(c)(2).)

* * *

The fundamental similarities in how the networking site LinkedIn and the search engine Bing use algorithmic recommendations to publish third-party content demonstrate the unprincipled nature of Petitioners' effort to limit Section 230 immunity to search engines.

C. The Government does not draw a principled or workable line between protected and unprotected uses of algorithmic recommendations.

Recognizing the flaws in Petitioners' rule, the Government takes a different approach. But the lines that it draws are hardly better than Petitioners'.

For starters, the Government proposes to distinguish between claims “premised on [the] *dissemination* of third-party speech” (which it says is protected by Section 230) and claims premised on “conduct [that] involves the ... *presentation* of third-party content” (which it says is not). U.S. Br. 16 (emphases added). But that is no distinction at all. *See* Resp. Br. 40. Selecting and arranging third-party content—that is, “present[ing]” it—*is* the very way in which platforms “disseminat[e]” such content. And, as explained above, the “presentation of third-party content” is what publishers do, under any sensible understanding of that term. *See Marshall's Locksmith*, 925 F.3d at 1269 (protected “re-publication of ... information” includes circumstances where “data is collected from a third party and re-presented in a different format”).

Next, the Government argues that a platform communicates its *own* message—and, therefore, is

not publishing the content of “another”—when it uses an algorithm to display third-party content that a user did not ask explicitly to see. U.S. Br. 27. Its theory is that the mere “appearance” of the third-party content “communicates the implicit message” that the service thinks the user will like the content. *Id.* at 27-28. But that is not a sound basis for differentiating recommendation algorithms from anything else a platform does, for in choosing to display *any* information by *any* means, a platform is sending an “implicit message” that the information will be of interest. *See* Resp. Br. 43-44. Critically, it is what is of interest to *users*, based on information that those users themselves provided.

News services show just how untenable the Government’s lines are in practice. For a service that aggregates news from a variety of third-party sources, dissemination is indistinguishable from presentation—rendering the Government’s first line incoherent. These services cannot *disseminate* the information without *presenting* it in some sensible order, which is what the algorithms help them to do. As to the Government’s second proposed distinction, a news aggregator could fall outside of Section 230— notwithstanding that it is perhaps the closest digital analog to a traditional publisher—simply because, by performing the basic function of displaying news articles a user did not specifically request, it is communicating “implicit messages.” The example of Microsoft Start shows the incoherence of these efforts to trim Section 230.

* * *

Microsoft Start

The beauty of the internet is that it has something for everyone, and the beauty of Microsoft Start is that it brings it all together in one place. And so the Seattle-based fast-food-loving sports fan who is also an avid investor and space enthusiast can turn to Microsoft Start to get all the news that’s fit for her in one spot—no more bouncing back and forth between the *Seattle Times*, food blogs, ESPN, Bloomberg, and *Scientific American*.

Microsoft Start is a personalized online news, entertainment, and lifestyle service. Much like a “traditional” publisher or editor, Pet. i, 21-26, Microsoft Start republishes articles, images, and videos created by content creators from around the world. Microsoft Start does not itself create, edit, or modify the content it displays; instead, it works as a conduit connecting roughly half a billion users to stories across the web.⁷

When a user navigates to Microsoft Start, they are greeted by a “feed” of “content tiles”—small boxes containing continually updating national and local

⁷ Microsoft Start is available at <https://www.msn.com/en-us/feed>. For additional information, see Microsoft, *Microsoft News feedback – frequently asked questions*, <https://support.microsoft.com/en-us/topic/microsoft-news-feedback-frequently-asked-questions-efc5ae67-74c0-4a5a-df8e-20db14c8255f> (last visited Jan. 18, 2023); Liat Ben-Zur, *Microsoft Start: The content you care about, simplified and reinvented*, Microsoft: Windows Blogs (Sept. 7, 2021), <https://blogs.windows.com/windowsexperience/2021/09/07/the-content-you-care-about-simplified-and-reinvented-introducing-microsoft-start/>.

news, weather, stock updates, sports scores, and more:

The dashboard features a grid of content:

- Top stories:** Three news items from HuffPost, USA Today, and NPR, each with a small image and a 'See top stories' link.
- Weather:** A blue header for Seattle, WA, showing a sun icon, 78°F, and 'Strong UV today' with a 0% humidity indicator. A 'See full forecast' link is below.
- NFL:** A light blue section for Week 17 of the Steelers vs. Buccaneers game, showing a score of 22-33 and 'Q4 · 6:34 · CBS'. A 'See more' link is present.
- Watchlist:** A light purple section showing stock market performance for Dow Jones (33,630.61, +2.13%), Nasdaq (10,569.29, +2.56%), and Russell 2000 (1,792.80). A 'See watchlist' link is at the bottom.
- Video thumbnails:** Three video cards with play buttons, durations of 3:45, and view counts of 13,570. The titles are: 'What Davos Looks Like When the World Economic Forum Is Canceled' (174 likes, 25 comments), 'On Her Way Up: Yankees Tap Woman as Minor League Manage' (32 likes, 84 comments), and 'Webb Telescope Images Provide New Window Into the Cosmos' (60 likes, 8 comments).
- Article:** A light orange card titled 'Taco Bell Quietly Revives Fan-Favorite Menu Item' (16 likes, 8 comments).

A user can click on a hyperlinked headline in the Microsoft Start feed—whether a CNN article about international politics or the local paper’s story on an upcoming school board election—and follow it to a page where the article appears in full.

Microsoft Start arranges stories using many of the same standards as a traditional publisher. News-worthiness, quality and credibility, balanced content, and user interest all factor into Microsoft Start’s choices of which content to present and how to present it. Just as a traditional publisher might put a major political event on the front page, Microsoft Start may post a link to that same article near the top of the feed.

In the digital space, however, those choices must be made across exponentially more content and in much less time. And so Microsoft Start relies on algorithms trained on user preferences to present the third-party content it aggregates. For instance, like a search engine (*supra* 10), Microsoft Start takes into consideration a user’s prior use of the service. If a user repeatedly clicks on stories on a particular topic (say, inflation), the algorithm uses those inputs to provide her with more quality stories on inflation. Users may also choose to follow topics, such as a particular sports team, which provides further data the algorithm uses to tailor content to the user. And, like Bing, Microsoft Start considers a user’s language and location, so that it can provide the appropriate updates on weather, traffic, and news from local and regional outlets.

* * *

As this description makes clear, the Government’s rule goes too far, capturing what is plainly the publication of another’s content, based on a set of distinctions (e.g., “dissemination” versus “presentation”) that are untenable. Contrary to the Government’s view, these platforms use recommendation algorithms, not to create their own content for consumer consumption, but to connect users to others’ content, based on the information the platforms have processed about them.

Microsoft Start also demonstrates why Petitioners’ rule makes even less sense. Under Petitioners’ rule, Microsoft Start seemingly would be deprived of Section 230 protection when it displays the articles presented by other news outlets and content creators. Why? Because when you click on a content tile for a news article in the Microsoft Start feed—even an article written by, say, *The Wall Street Journal*—that article then appears on a page hosted on Microsoft Start, with a Microsoft URL. *See* Pet. Br. 39 (arguing that, when YouTube itself “provides a user the URL that YouTube itself created for the video,” it is not publishing “content ‘created by another,’” as is required for protection under Section 230(c)(1)). Microsoft Start also displays “the number of likes, shares, and comments,” which, according to Petitioners (at 33-34), takes platforms outside of Section 230’s protection. This only confirms the illogic of Petitioners’ position. When Microsoft Start shares information about the “likes, shares, and comments” posted by users, it is, under any sensible understanding of the term, “publishing” the content of others—

that is, sharing the fact that those users (not Microsoft Start) like the material, have decided to pass it on to others, or have thoughts about it.

In short, none of the lines drawn by Petitioners or the Government provides a principled or even coherent way to differentiate uses of recommendation algorithms that are protected by Section 230 from those that are not.

II. Petitioners And Their Amici Fail To Appreciate The Serious Risks Of Exposing Online Platforms To Liability For Their Use Of Algorithmic Recommendations.

A. Increased liability for algorithmic recommendations would ensnare a vast array of services.

As demonstrated above, both Petitioners' and the Government's proposed rules would severely circumscribe Section 230(c)(1)'s immunity, exposing innumerable online platforms to liability simply for making it possible for users to access the third-party content that is most relevant to them. As a result, platforms would be forced to adopt a far blunter and more severe approach to removing content. *See infra* § II.B. That would directly undermine Congress's policy goal, expressly enshrined in Section 230, "to preserve the vibrant and competitive free market that presently exists for the Internet." 47 U.S.C. § 230(b)(2).

The risk is real, for it is not just search engines, networking sites, and news aggregators caught in the

crosshairs. Algorithmic recommendations are critical to a variety of vital services that host third-party content that could be alleged to be harmful in some way. A rule like Petitioners', which seemingly would exclude such recommendations from the scope of Section 230, would pose massive risk for these services. That includes platforms like Microsoft's GitHub, which uses such recommendations to drive the software innovation that underpins every sector of our "vibrant and competitive" economy.

* * *

GitHub

Open any application on your phone. You won't see it, but behind every app is computer code—the instructions for computers written in programming language. Behind the user interface? Code. Behind the notifications? Code. Behind the functions that the users employ to make the app do what it does? Code: "the brick and mortar of cyberspace."⁸ GitHub is the platform that over 94 million developers use to collaborate on code.⁹ It is a community where developers around the world can collaborate to find solutions to shared problems, and thus to build and distribute the

⁸ Jorge R. Roig, *Decoding First Amendment Coverage of Computer Source Code in the Age of YouTube, Facebook, and the Arab Spring*, 68 N.Y.U. Ann. Surv. Am. L. 319, 396 (2012).

⁹ GitHub can be found at <https://github.com/>, and information about its features can be found at <https://github.com/features>.

software underpinning the world’s digital infrastructure. And algorithms help make it possible to do so.

Here’s how it works. Within a given team or organization, developers use GitHub’s cloud-based platform to work on one section of a project without affecting the rest of the project—and to allow collaborators to join them while maintaining control over different versions of the code. In addition, the platform allows developers from around the world to find, share, and improve software code, much of which is “open source” software—that is, software whose code is available to anyone to use, modify, and distribute. GitHub is home to millions of free, public repositories of code. Users can use the platform to find projects that respond to their needs; they can share projects with the developer community; and they can discover projects and other users that correspond to their interests, whether through GitHub’s code search engine or via a “feed” on users’ homepages that offers a curated list of projects and developers.

Importantly for present purposes, tools that GitHub uses to connect developers and help them improve code rely on recommendations enabled by algorithms. For example, the feed uses algorithms to recommend software to users based on projects they have worked on or showed interest in previously. In addition, GitHub’s internal code search engine uses algorithms to identify and return projects and repositories that are most relevant to users. Much like Bing, this search function relies on algorithms to rank results most responsive to users’ queries, taking into account criteria like whether the code is final or in the testing phase, the extent to which the result matches

the user’s query, and how popular a project is. GitHub also uses algorithms to recommend ways to improve code, for example, notifying users of a potential security vulnerability in their code—a vulnerability that could affect thousands or more apps and devices.

In all of these ways, GitHub’s use of algorithm-enabled recommendations connects developers with useful software projects and helps maintain the integrity of the world’s interconnected software supply chain.

* * *

GitHub serves a critically valuable purpose. And, like the other services described above, in doing so it depends on algorithms that identify relevant content and share it with users. When developers use GitHub to share their code, GitHub is neither communicating its own message nor distributing its own content; it is “disseminati[ng]” the content of others. U.S. Br. 16. A rule that holds otherwise and narrows GitHub’s immunity could impose crippling liability. Notwithstanding GitHub’s good-faith efforts to moderate problematic content, if any such content gets through, the mere act of selecting it for others to see—a quintessential act of publishing—could, on the Government’s theory, foreclose the application of Section 230. And, on a platform with 94 million developers, the consequences are potentially devastating for the world’s digital infrastructure. Nothing in the statute requires this result.

B. Petitioners and their supporters misunderstand how platforms will be forced to respond to their rule of sweeping liability.

1. The points made above about the vital role that recommendation algorithms play in powering Bing, LinkedIn, Microsoft Start, and GitHub also apply to many, many other services that rely on such algorithms. Indeed, just within the Microsoft universe, a similar story could be told about videogaming platform Xbox and the Microsoft Store, which offers apps, games, and videos for sale.

And while diverse platforms may be forced to respond differently to a decision that embraces Petitioners' restrictive rule, they inevitably will have to dramatically cut down on the content they allow on their services—even content they have no reason to believe falls afoul of any law. In a world of millions of users and billions of interactions, the risks of imperfect moderation will simply be too high to let anything even close to questionable stay up. As Judge Wilkinson recognized, without the safe harbor provided by Section 230(c)(1), service providers “would have a natural incentive to simply remove” content “[b]ecause [they] would be subject to liability only for the publication of information, and not for its removal.” *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997); *see also* Resp. Br. 4-5 (Adopting Petitioner's view “would turn the internet into a dystopia where providers would face legal pressure to censor any objectionable content.”).

To put it in concrete terms, for Bing that means that certain content that currently is downranked on certain searches, but is still accessible with a tailored enough inquiry, might be gone from the results altogether. And so, for instance, an academic or advocate with a legitimate research interest in a particularly noxious conspiracy theory won't be able to locate postings that could help expose and explain the phenomenon if there's a risk that the conspirators could be accused of, say, harassment.

For LinkedIn, a rule that forces platforms to take a grossly overprotective approach to content moderation leads to a world with less economic opportunity. For every legitimate job post LinkedIn takes down out of an abundance of caution, due to a misperceived fear of claims of fraud, discrimination, or some other illegality, there is one more person who must wait to find a job, and one more business that goes that much longer without a qualified candidate.

For Microsoft Start, a heightened risk of liability might mean a less diverse set of news offerings, in direct contravention of Congress's aim to protect the internet as "a forum for a true diversity of political discourse." 47 U.S.C. § 230(a)(3). News aggregators may be less willing to include local news outlets, for instance, which likely have fewer resources to spend on enforcing trust-and-safety standards that could weed out, for example, defamatory content. And they won't be able to defend and indemnify the aggregator in the way large media conglomerates can. As a result, the universe of opinion will shrink.

For GitHub, the blunt and broad takedown regime that Petitioners' rule would usher in means that things literally will break. As explained above, due to the interdependent nature of code collaboration, wrongful takedowns can break developer ecosystems and compromise critical digital infrastructure. Taking down one iteration of code, just because it appears in a program someone has accused of misuse, will have the immediate consequence of unraveling the numerous other projects that rely on that same code. And even if the code can be restored, the disruption cannot be undone.

2. These devastating consequences cannot be avoided with the simplistic solutions that some have proposed.

One suggestion is that a platform “could stop using ... algorithms altogether.” *Force v. Facebook, Inc.*, 934 F.3d 53, 83 (2d Cir. 2019) (Katzmann, C.J., concurring in part and dissenting in part). For all of the reasons discussed above, that is impractical if not impossible, particularly given the incomprehensibly massive volume of content on the internet. Algorithms are integral to the functioning of countless internet services and platforms; there is simply no practical way to function without them. Doing so would cause massive degradation or disruption of key services. *See* Resp. Br. 11 (“Virtually no modern website would function if users had to sort through content themselves.”).

Nor is it feasible for a service to simply “modify its algorithms to stop them introducing terrorists to one

another,” *Force*, 934 F.3d at 83 (Katzmann, C.J., concurring in part and dissenting in part)—or, more precisely, to stop doing everything any plaintiff might target for liability. *See* Resp. Br. 47 (“Congress did not enact Section 230 as a paper shield for plaintiffs to blow down with artful pleading.”); *cf. OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 36 (2015) (rejecting an interpretation of the Foreign Sovereign Immunities Act that would permit plaintiffs to evade statutory immunity through a “feint of language” by recasting an intentional tort as a failure to warn). There are limits to how sensitively algorithms can be trained to operate. And regardless of how algorithms are changed, a plaintiff always can claim that more could have been done, and the *in terrorem* effect of these high-profile allegations (blaming algorithms for mass shootings, suicides, and the like), multiplied by the vast volume of the internet and the innumerable people who use it, will be disabling. Moreover, if anything, ruling for Petitioners here may incentivize platforms to modify algorithms in the *opposite* direction. By relying on crude sorting mechanisms, like chronological or alphabetical order, platforms may avoid the implicit endorsement that Petitioners and the Government accuse their more sophisticated algorithms of making. But this would be a giant step back for the internet, depriving these services of what makes them so valuable in the first place: They serve up what users want, tailored to their needs, whether that’s the job they’re looking for or the news that matters to them—a feature that doesn’t just improve the individual user experience but also (as explained above) powers innovation and sustains economic success.

A change to the prevailing regime that would bring about such far-reaching consequences is one that should be left to the political branches in the first instance, informed by the sort of careful factual and empirical study that they are best equipped to make. Congress and the President are better positioned to take a holistic approach to the statute, exploring how Section 230(c)(1) interacts with critical provisions such as Section 230(c)(2), and how those parts work together, and can work better, to protect digital safety.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be affirmed.

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